(2)

No. 03-1333

Supreme Court, U.S.
FILED
APR 19 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ISABEL HERNANDEZ FOR HERSELF AND ON BEHALF OF HECTOR HERNANDEZ' ESTATE,

Petitioners,

v.

EL PASO ENERGY CORPORATION (NOW KNOWN AS EL PASO CORPORATION), AND THE EL PASO NATURAL GAS COMPANY EMPLOYEE SEVERANCE PROTECTION PLAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

FRASER A. MCALPINE
State Bar No. 13321300
AKIN GUMP STRAUSS HAUER & FELD LLP
1111 Louisiana Street, 44th Floor
Houston, Texas 77002
(713) 220-8129 (Telephone)
(713) 236-0822 (Facsimile)

Attorney for Respondents

BEST AVAILABLE COPY

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6 of the Rules of the United States Supreme Court, Respondents disclose the following:

1. Respondent El Paso Corporation is a publicly traded corporation. El Paso Corporation has no parent corporation.

2. Pacific Financial Research, Inc. (PFR) owns approximately 12.6 percent of the stock of El Paso Corporation. PFR is a wholly owned subsidiary of United Asset Management Corporation, which is a wholly owned subsidiary of Old Mutual plc, a United Kingdom based financial services group. Old Mutual plc is publicly traded.

3. Respondent The El Paso Natural Gas Company Employee Severance Protection Plan was superceded by The El Paso Energy Corporation Employee Severance Protection Plan. That Plan is an employee welfare benefit plan sponsored by El Paso Corporation, and that benefit plan has no parent corporation.

STATEMENT OF THE CASE

Hector Hernandez died while employed by El Paso Natural Gas Company. His widow applied for severance benefits under the El Paso Energy Corporation Employee Severance Protection Plan ("the Plan"). The Plan is an employee welfare benefit plan subject to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461. The Plan provided severance benefits to eligible participants whose employment terminated under specified circumstances within two years after a change in control. The Administrator of the Plan denied the claim made by Mrs. Hernandez.

The material facts are:

1. On October 25, 1999, El Paso was a party to a merger constituting a change in control within the meaning of the Plan;

2. In January of 2001, El Paso notified Hector Hernandez that his layoff was tentatively scheduled to occur on May 31, 2001;

3. On January 26, 2001, Hector Hernandez died.

The pertinent provisions of the Plan provide:

Section 4.1 Right to Severance Benefit

(a) A Participant shall be entitled to receive from the Company a Severance Benefit in the amount provided in Section 4.2 if (i) a Change in Control has occurred and (ii) within two years thereafter, the Participant's employment with the Company terminates for any reason, except that notwithstanding the provisions of this paragraph (a), no benefits under this Plan are payable should the Participant's termination of employment be . . . (D) by reason of the Participant's death.

Section 5.2 Termination Date

In the case of the Participant's death, the Participant's Termination Date shall be his or her date of death. In all other cases, the Participant's Termination Date shall be the date specified in the Notice of Termination. . . .

ARGUMENT

The premise underlying the Petition for Writ of Certiorari is that the District Court failed to apply the *de novo* standard of review when determining whether the Plan Administrator properly rejected the application for severance benefits. That premise is based on the argument (i) that the District Court found that the Plan Administrator's interpretation of the plan provisions was "fair and reasonable," and therefore (ii) the District Court did not apply the *de novo* standard. There is, however, nothing in the District Court's Memorandum Opinion and Order that indicates that the District Court upheld the Plan Administrator's interpretation because it was "fair and reasonable." Indeed, the phrase "fair and reasonable" does not appear in the District Court's Memorandum Opinion and Order.[1]

Instead, the District Court's Memorandum Opinion and Order reveals that the Court applied the *de novo* standard of review by "looking to the terms of the plan and other manifestations of the parties' intent." *Firestone Tire*

[1] The Memorandum Opinion and Order is reproduced in Appendix B to the Petition for Writ of Certiorari.

& Rubber v. Bruch, 489 U.S. 101, 113 (1989). Petitioner acknowledges that the District Court concluded that the Administrator applied the legally correct interpretation of the Plan. (Pet. at 12.) Petitioner nevertheless argues that this conclusion was the product of deference to the Administrator's interpretation. (*Id.* at 13.) Nothing in the District Court's Memorandum Opinion and Order suggests that the District Court deferred to the Plan Administrator or presumed that the Administrator's decision was correct. To the contrary, the District Court based its decision on its own *de novo* interpretation of the Plan, concluding that "Section 4.1(a)(D) clearly and unambiguously precludes Plaintiff from receiving any severance benefits under the Plan."[2] Because the Plan states that "no benefits under this Plan are payable should the Participant's termination of employment be . . . by reason of the Participant's death,"[3] the District Court correctly decided that the Plan Administrator properly denied the claim for benefits asserted by Hector Hernandez's widow because Mr. Hernandez's employment terminated upon his death.

Further, even if we assume that there is some lack of clarity about the standard of review used by the District Court, the Petitioner seeks review of the decision of the Court of Appeals, not the decision of the District Court. The Court of Appeals applied the "less deferential de novo standard" and determined that the "administrator's interpretation of the plan was legally correct."[4] Accordingly, even

---

[2] See Appendix B to the Petition for Writ of Certiorari at 15a.

[3] *Id.* at 8a-9a.

[4] The opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in Appendix A to the Petition for Writ of Certiorari.

if the District Court had used the wrong standard of review, the Court of Appeals did not.

Finally, Petitioner has not shown that this case involves an issue that requires this Court to clarify a point of law or resolve a split of authority among the Circuit Courts. Respondents submit that this Court should, therefore, deny the Petition for Writ of Certiorari.

CONCLUSION

The Petition for Writ of Certiorari incorrectly assumes that the lower courts failed to conduct a *de novo* review of the denial of benefits by the Administrator of the Plan. Because both the District Court and the Court of Appeals properly conducted a *de novo* review to determine the legally correct interpretation of the Plan, Respondents assert that the United States Supreme Court should deny the Petition for Writ of Certiorari filed by Isabel Hernandez.

Respectfully submitted,

FRASER A. MCALPINE
State Bar No. 13321300
AKIN GUMP STRAUSS HAUER
& FELD LLP
1111 Louisiana Street, 44th Floor
Houston, Texas 77002
(713) 220-8129 (Telephone)
(713) 236-0822 (Facsimile)

Attorney for Respondents